

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

JOHN E. McLaurin,

Petitioner,

vs.

CIVIL ACTION NO. 2:00-0275

DAVID BALLARD, Warden,
Mount Olive Correctional
Complex,

Respondent.

MEMORANDUM OPINION AND ORDER

Pending is (1) a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, filed April 10, 2000, (2) respondent's motion for summary judgment, filed November 16, 2007, and (3) respondent's supplemental motion for summary judgment, filed May 15, 2008.

This action was previously referred to Mary E. Stanley, United States Magistrate Judge, who, on September 4, 2008, submitted her Proposed Findings and Recommendation ("PF&R") pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B). On September 26, 2008, respondent objected, after both parties were granted an extension of time for filing objections.

The magistrate judge recommends that an order be entered as follows:

1. Denying respondent's motion for summary judgment without prejudice pending further proceedings, and thus necessarily leaving open for additional development, the questions concerning whether Grounds 1(a) through (g), 2 through 5, 8, and 15(a), (b), and (d) are procedurally defaulted and whether Grounds 6 through 9 and 15 were fully and fairly litigated during the state proceedings; and
2. Granting respondent's supplemental motion for summary judgment and dismissing Grounds 1(h) and 10 through 14.

Respondent objects to the PF&R on essentially two bases. First, respondent contends that Grounds 1(a) through (g), 2 through 5, 8, and 15(a), (b), and (d), are barred based upon procedural default. The magistrate judge concluded that "the record does not clearly support" the contention. (PF&R at 53). Second, respondent asserts that Grounds 6 through 9 and 15 were fully and fairly litigated in the state proceedings. The magistrate judge concluded genuine issues of material fact remained on the point.

As noted by the respondent, the proceedings respecting the petitioner have resulted in "nineteen years of continuous litigation in the state courts" (Objecs. at 12). As one might expect, the record is somewhat complex. The PF&R essentially concludes that the record is not presently clear enough to warrant judgment as a matter of law concerning the defenses lodged in respondent's motion for summary judgment. Respondent is not precluded from refining and fortifying his arguments during the further proceedings before the magistrate judge.¹

Based upon the foregoing discussion, the court ORDERS as follows:

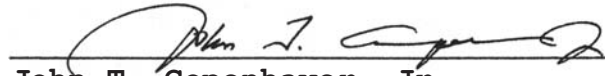
1. That the PF&R be, and it hereby is, adopted by the court and incorporated herein;
2. That respondent's motion for summary judgment be, and it hereby is, denied without prejudice pending further proceedings;

¹For example, it appears that respondent's objections suggest petitioner may indeed have fully and fairly litigated Ground Nine and perhaps other Grounds. The matter is properly left, however, for further development of the record before the magistrate judge.

3. That respondent's supplemental motion for summary judgment be, and it hereby is, granted and Grounds 1(h) and 10 through 14 are dismissed with prejudice; and
4. That this action be, and it hereby is, recommitted to the magistrate judge for further proceedings consistent with the referral order entered December 27, 2006.

The Clerk is directed to forward copies of this written opinion and order to the pro se petitioner, all counsel of record, and the United States Magistrate Judge.

DATED: September 30, 2008



John T. Copenhaver, Jr.
United States District Judge